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No. 88-1446

In the Supreme Court of the United States

OCTOBER TERM, 1988

NEW YORK STATE OPHTHALMOLOGICAL SOCIETY, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Section 9307(c)(2) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 42 U.S.C. 1395u(k)(1) and (2) (Supp. IV 1986), prohibits physicians from billing Medicare patients for services of an assistant cataract surgeon ("CAS") unless those services have been approved by an insurance carrier or designated state Peer Review Organization. The questions presented are:

1. Whether petitioners' claim that Section 9307(c)(2) violates patients' constitutional right to choose medical treatment is ripe when neither the patients in this case nor their physicians have made any effort to obtain approval of the use of a CAS.

2. Whether Section 9307(c)(2) is unconstitutional on its face because it deprives patients of their right to choose medical treatment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 854 F.2d 1379. The opinion of the district court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1988. The court of appeals denied rehearing on December 2, 1988 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on March 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are prospective cataract surgery patients in New York and California, ophthalmologists practicing in those two states, and their state professional associations. They filed this action for declaratory and injunctive relief in the United States District Court for the District of Columbia, challenging the constitutionality of Section 9307(c)(2) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 42 U.S.C. 1395u(k)(1) and (2) (Supp. IV 1986). That provision forbids a physician from billing a Medicare beneficiary directly for the costs of an assistant cataract surgeon (CAS) unless those services have been approved by an insurance carrier or designated state Peer Review Organization (PRO).[1] None of the petitioners sought approval for the use of a CAS in a cataract surgery prior to filing this lawsuit.

2. The district court denied petitioners' motion for a preliminary injunction (Pet. App. 38a-39a) and granted the government's motion to dismiss the complaint (*id.* at 40a). The court rejected petitioners' contentions that the statutory prohibition violated the "patients' constitutional rights to privacy, liberty and association and the physicians' constitutional rights to association, free speech and due process" (*id.* at 38a).[2]

[1] Section 9307(c)(2)'s prohibition does not extend to instances where use of a CAS has been approved for Medicare reimbursement. Section 9307(a)(3), in turn, provides that Medicare reimbursement is allowed only where a PRO or a carrier acting on the Secretary's behalf finds that the use of a CAS is warranted because of a patient's complicating medical condition (see 42 U.S.C. 1395y(a)(15) (Supp. IV 1986)). Although PRO approval will normally occur prior to surgery, the procedures for approval also permit a PRO to approve the use of a CAS after surgery where use of a CAS occurred because an emergency arose during surgery.

[2] In this Court, petitioners are asserting an infringement only of patients' constitutional rights.

3. The court of appeals affirmed (Pet. App. 1a-35a). The court concluded that petitioners' claim that the statute deprived them of liberty without due process was not ripe for judicial review (*id.* at 17a-19a). According to the court, "patients must at least proceed through the stage of application to the PRO and denial of their claims if a court is to consider fully their due process argument" (*id.* at 18a). Although petitioners' privacy claim was held ripe for review (*id.* at 13a-17a), the court rejected that claim on the merits (*id.* at 19a-26a). The court concluded that there was no merit to petitioners' assertions that "the constitutional right to privacy comprehensively protects all choices made by patients and their physicians or subjects to 'strict scrutiny' all government interference with choice of medical treatment" (*id.* at 19a). The court reasoned that "[i]n the case of choosing the number of surgeons participating in a surgical procedure designed to save sight, * * * the prerequisite to a successful privacy claim would be a definite showing of medical necessity and the unavailability of equally effective alternative therapy" (*id.* at 24a). The court concluded that petitioners had failed to make such a showing in this case (*id.* at 24a-26a).

Judge Williams filed a separate opinion concurring in part and dissenting in part (Pet. App. 26a-35a). He disputed the majority's analysis of the merits of petitioners' constitutional claim but joined the court's judgment on the ground that the lawsuit was unripe in its entirety (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners' constitutional claims are not ripe. Petitioners contend that, by prohibiting a doctor from billing

a Medicare beneficiary for the costs of a CAS, Section 9307(c)(2) unconstitutionally deprives patients of their choice to obtain those services at their own expense. Since petitioners concede that their claim would be without merit if a CAS contributed no increment in safety in unapproved situations (Pet. 13 n.8), their constitutional claim is premature because no patient or physician in this case has sought approval from a PRO or a carrier for use of a CAS in a particular surgery. Unless and until such an application has been made and denied, the statute has not adversely affected the ability of any petitioner to obtain medical services. Judicial review of a constitutional challenge to Section 9307(c)(2) should await the development of such a concrete controversy. See *Williamson County Comm'n* v. *Hamilton Bank,* 473 U.S. 172, 199-200 (1985); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-149 (1967).

2. The court of appeals, for this reason, concluded that petitioners' claim that they had been deprived of liberty without due process was not ripe for review (see Pet. App. 17a-19a). The court concluded, however, that petitioners' complaint raised a separate constitutional claim—based on their right to privacy—that was ripe for adjudication (see *id.* at 13a-17a): a claim that the very requirement of prior approval was, in itself, a violation of that right. Like Judge Williams (see *id.* at 31a-32a), we do not believe that any such distinct constitutional claim ripe for review can be fairly gleaned from petitioners' complaint.[3] But, in any event, further review is not warranted because

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[3] Petitioners do not embrace the court of appeals' suggested dichotomy between patients' privacy and liberty interests. They instead characterize the claimed constitutional right—the right to secure the services of a CAS—as either a "liberty or privacy interest" (see Pet. 14).

the court of appeals correctly rejected that privacy claim on the merits.

Contrary to petitioners' contention (Pet. 14-21), this Court has never swept into the constitutional right of privacy all choices concerning medical treatment made by patients and their physicians so as to subject to strict scrutiny any governmental interference with a person's choice of medical treatment. As the court of appeals explained (Pet. App. 14a-21a), "[t]here is no basis under current privacy case law for extending such stringent protection to every decision bearing, however indirectly, on a person's health and physical well-being. Furthermore, the problem of determining what kinds of decisions qualify as 'medical decisions' eligible for such protection demonstrates that [petitioners'] contentions provide no manageable constitutional standard" (*id.* at 19a).

The decisions of this Court cited by petitioners in support of their view (see Pet. 15-20) are not to the contrary. *Youngberg* v. *Romero,* 457 U.S. 307, 315-319 (1982), upon which petitioners rely (Pet. 14), concerned a mentally retarded individual who had been committed to a state institution; the constitutional claim asserted was the right to reasonable safety and freedom from physical restraint during the period of commitment.

Nor does this Court's decision in *Winston* v. *Lee,* 470 U.S. 753 (1985), also discussed by petitioners (Pet. 15-16), aid their cause. As petitioners acknowledge, *Winston* involved the wholly distinct issue whether the government could "*require* a medical procedure that could pose risks to the patient" (Pet. 16). The commonsense notion that "[a] compelled surgical intrusion into an individual's body * * * implicates expectations of privacy and security" (470 U.S. at 759) cannot, as petitioners suggest, be readily transformed into the far broader proposition that any matter implicating human health, including the ability to

choose medical treatment, similarly implicates fundamental constitutional concerns requiring heightened standards of judicial review.[4]

Petitioners' reliance (Pet. 16-18) on this Court's decisions arising in the abortion context is likewise misplaced. As the court of appeals explained (Pet. App. 20a), "[t]he Constitution shelters the medical decision-making process in the context of abortion not because it is 'medical,' but as a means to the end of free reproductive self-determination or autonomy."[5]

Finally, there is no merit to petitioners' claim (Pet. 20-21) that the court of appeals erred in upholding dismissal of their complaint on the ground that petitioners had failed to make the "definite showing" requisite "to a successful privacy claim * * * of medical necessity and the unavailability of equally effective alternative therapy" (Pet. App. 24a). Contrary to petitioners' assertion (Pet. 20), the court of appeals did not "confuse[ ] the question of the existence of a constitutionally protected interest with the question of whether that interest can be immunized from all government regulation" (*ibid.*). The court of appeals never purported to describe the universe of circumstances in which an individual's interest in health-related matters would be entitled to some weight in constitutional analysis. The court was instead addressing only

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[4] Similarly, the claim in *Washington* v. *Harper*, cert. granted, No. 88-599 (Mar. 6, 1989), currently pending before this Court, concerns the scope of a patient's right to *refuse* treatment that the State proposes to administer.

[5] For this reason, there is also no merit to petitioners' suggestion (Pet. 22-23) that this Court's decision to note probable jurisdiction in *Webster* v. *Reproductive Health Services*, No. 88-605 (argued Apr. 26, 1989), renders review here more appropriate. (In *Webster*, the Court has been asked to reconsider *Roe* v. *Wade*, 410 U.S. 113 (1973).)

the discrete instances in which the medical treatment decision might be sufficiently "consequential to merit a high level of protection from governmental interference" pursuant to strict scrutiny review (Pet. App. 24a).[6] Indeed, the only "interference" whose validity was at this point under consideration by the court was the statutory requirement of prior approval of a CAS. Because no showing of medical necessity had been made, and because this statutory requirement represents a reasonable effort by Congress to limit Medicare expenditures for routine cataract surgery without burdening Medicare beneficiaries, dismissal of petitioners' complaint was proper.

3. The petition does not present an issue of "national importance" warranting this Court's review at this time (see Pet. 21-23). The court of appeals' decision is the first in which such a constitutional challenge has been made to Section 9307(c)(2). Hence, no circuit conflict currently exists. Indeed, petitioners do not cite in the petition, nor are we aware of, any other court of appeals decision accepting a similar claim. There is no reason therefore to suppose that petitioners' novel theory of constitutional law raises a pressing issue requiring this Court's review.

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[6] Hence, petitioners are mistaken in their characterization of the court of appeals' decision as ruling "that the Constitution affords no protection to any patient treatment decisions other than those that are 'indispensable to patient well-being' " (Pet. 14 (quoting Pet. App. 25a)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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